1992

Robert F. Bennion v. UTAH COUNTY BOARD OF ADJUSTMENT, COUNTY COMMISSION, UTAH COUNTY PLANNING COMMISSION, JEFFREY R. MENDENHALL, COUNTY ZONING ADMINISTRATION, SUNDANCE DEVELOPMENT CORPORATION, a Utah Corporation, SUNDANCE VILLAGE COTTAGES, LTD., a UTAH CORPORATION, CHARLES ROBERT REDFORD, C. CRAIG LILJENQUIST, KAY BRYSON, Utah County Attorney, GUY R. BURNINGHAM, Deputy Utah County Attorney and Civil Division Chief, JERIL B. WILSON,

Deputy Utah County Attorney, E. KENT SUNDBERG, Deputy Utah County Attorney : Brief of Appellant

Utah Court of Appeals

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Richard C. Coxson; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

ROBERT F. BENNION, Plaintiff-Appellant	:	
vs.	:	Case No. 920628-CA
UTAH COUNTY BOARD OF ADJUSTMENT, COUNTY COMMISSION, UTAH COUNTY PLANNING COMMISSION, JEFFREY R. MENDENHALL, COUNTY ZONING ADMINISTRATION, SUNDANCE DEVELOPMENT CORPORATION, a Utah Corporation, SUNDANCE VILLAGE COTTAGES, LTD., a UTAH CORPORATION, CHARLES ROBERT REDFORD, C. CRAIG LILJENQUIST, KAY BRYSON, Utah County Attorney, GUY R. BURNINGHAM, Deputy Utah County Attorney and Civil Division Chief, JERIL B. WILSON, Deputy Utah County Attorney, E. KENT SUNDBERG, Deputy Utah County Attorney,	:	Priority No. 1
Defendants-Respondents.		

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE CULLEN Y. CHRISTENSEN, JUDGE, PRESIDING

PARTIES

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLANT

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I. JURISDICTION

This is an appeal from a dismissal by the Fourth District Court, Utah County, State of Utah of Appellant's action. The Court of Appeals has jurisdiction pursuant to Utah Coded Annotated Section 78-2-2(3)(j).

II. STATEMENT OF THE ISSUE

a. Whether appellant exhausted his administrative remedies prior to bringing this action.

Standard of Review

> Questions of whether a party has failed to comply with the requirements of a statute and the rules of civil procedure sufficient to justify dismissal are questions of law, and on appeal, we accord no particular deference to the determinations of law made by the trial court but review them for correctness. Avila v. Winn, 794 P.2d 20,22 (Utah 1990).

In Arrow Indus. vs. Zions First Nat. Bank, 767 P.2d 935 (Utah 1988), the court held that:

> A motion to dismiss is only appropriate where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of its claim. In reviewing an order granting a motion to dismiss, we are obliged to construe the complaint in the light most favorable to the plaintiff and to indulge all reasonable inferences in its favor. Arrow Indus., 767 P.2d at 936.

b. Whether appellant must comply with the Governmental Immunity Act when bringing an action for vacation and appeal of a Board of Adjustment ruling.

> Questions of whether a party has failed to comply with the requirements of a statute and the rules of civil procedure sufficient to justify dismissal are questions of law, and on appeal, we accord no particular deference to the determinations of law made by the trial court but review them for correctness. Avila v. Winn, 794 P.2d 20,22 (Utah 1990).

III. DETERMINATIVE PROVISIONS

a. U.C.A. Section 17-5-2:

> Each member of the board of county commissioners shall be an elector of the county which he represents and must have been such for at least one year immediately preceding his election, and he shall be elected by the qualified electors of the county at large.

b. U.C.A. Section 17-27-23 (1991):

> Violation of Chapter 27, Title 17, or of any adopted county zoning, subdivision, or official map ordinance is punishable as a class C misdemeanor. The Board of County Commissioners, the County Attorney or <u>any owner of real estate within the county</u> in which such violation occurs, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement or any other appropriate action or proceedings to prevent, enjoin, abate, or remove the unlawful building, use or act. (Underline added)

c. U.C.A. Section 63-30-1 et seq. (See Addendum 1)

d. U.C.A. Section 63-30-2(1) (Governmental Immunity Act) (See Addendum 1)

e. U.C.A. Section 63-30-5 (See Addendum 1)

f. U.C.A. Section 63-30-6 (See Addendum 1)

g. U.C.A. Sections 63-30-8, thru 10 (See Addendum 1)

h. U.C.A. Section 63-30-11 (See Addendum 1)

i. U.C.A. Section 63-30-12 (See Addendum 1)

j. U.C.A. Section 63-30-13 (See Addendum 1)

k. U.C.A. Section 63-30-14 (See Addendum 1)

l. U.C.A. Section 63-30-15 (See Addendum 1)

m. U.C.A. Section 63-30-19 (See Addendum 1)

n. U.C.A. Section 78-33-1 et seq. (Declaratory Judgment Act) (See Addendum 2)

o. U.C.A. Section 78-33-2:

> Any person interested under a deed, will or written contract, or whose rights, status or other legal relations are effected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

p. U.C.Z.O. Section 2-2 B 1:

B. LIST OF DEFINITIONS

1. Administrative Agency

The Utah County Planning Department, excluding the appointed Planning Commission.

q. U.C.Z.O. Section 2-2 B 2:

B. LIST OF DEFINITIONS

2. Administrative Officer

The Planning Director, the Zoning Administrator, or any of their duly appoint designees.

r. U.C.Z.O. Section 7-15:

APPEALS TO THE BOARD OF ADJUSTMENT

Any person, organization, corporation, or unit or department of government which has been aggrieved by a decision allegedly made in error by an administrative officer or agency; or requesting an interpretation of the zoning map; or wishing to make an appeal for a special exception or variance; may do so by filing a formal request in writing with the Zoning Administrator. The application shall be accepted by the Zoning Administrator only if accompanied by a non-refundable fee of the current amount as set by the Legislative Body, and if the application form has been properly filed within forty-five (45) days after the contested action of the administrative officer or agency. The application requesting to appear before the Board of Adjustment shall be made on forms furnished by the Zoning Administrator at least fifteen (15) days prior to the date of the hearing of the appeal.

s. U.C.Z.O. Section 7-24:

> Any person or persons, jointly or severely, aggrieved by any action of the Board of Adjustment, or any tax payer, or any office, department, board, or agency of the county, may have and maintain a plenary action for relief therefrom in any court of record to having competent jurisdiction, provided that petition for such relief is presented to the court within thirty (30) days after the filing of such decision in the office of the Board of Adjustment. Unless such petition for relief is presented to the court within said thirty (30) days, a decision of the Board of Adjustment shall be final. No decision of the Board of Adjustment shall be subject to rehearing, except when remanded from a county (SIC) of competent jurisdiction.

t. U.C.Z.O. Section 7-29:

> Any person, firm, corporation, or other entity violating any one of the provisions of this ordinance shall be guilty of a Class "C" misdemeanor for each such offense. The Board of County Commissioners, the County Attorney, or any owner of real estate within the county in which such a violation occurs, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or any other appropriate action or proceedings to prevent, enjoin, abate, or remove the unlawful building, use, or act.

u. Utah Rules of Appellate Procedure Rule 14: (See Addendum 3).

IV. STATEMENT OF THE CASE

Plaintiff-Appellant is a tax payer and owner of real property in Utah County. He has objected on numerous occasions to special treatment which has been accorded to Sundance Development Corporation by the administrative agencies and legislative body of Utah County.

Plaintiff-Appellant has brought no monetary claim which would fall within the purview of the Governmental Immunity Act, nor has he brought a claim for damages against the municipal bodies of Utah County. He brought this action timely to the District Court to appeal of a Board of Adjustment decision and has no further administrative remedy available to him. He brought an action to have a Plat which had been approved by the Board of County Commissioners and the Planning Commission vacated as well as building permits issues thereunder.

This trial court ruled as a matter of law that plaintiff had failed to exhaust his administrative remedy and that he was required to comply with the Governmental Immunity Act in bringing an action for vacation.

FACTS

1. Appellant is the owner of real property located in Utah County, State of Utah. (R at 87)

2. On December 5, 1991, the Board of Adjustment for Utah County ruled that:

a. It had no authority to review the actions of the Zoning Administrator regarding zoning decisions;

b. Appeals from the Planning Commission should go directly to the court, not to the coequal Board of Adjustment with which it has partially common membership; and

c. Permit 8663 be corrected to have the ownership changed to the proper entity. (R at 34)

3. Pursuant to statute, appeal to the district court was brought within thirty (30) days and Complaint herein was filed on or about January 2, 1992. (R at 2)

4. Appellant sought the following relief with the district court:

a. Abatement of building Permit 8780;

b. Declaration of rights of appellant with regard to appeals to the Board of Adjustment of actions of the Zoning Administrator;

c. Declaration of rights with regard to Permit 8663 and the original and sole jurisdiction of the Utah County Board of Adjustment to grant and hear variances;

d. Abatement of Plat "A" Amended [5] of the Sundance Recreational Resort; and

e. Compliance with the zoning ordinance by county officials and agencies. (R at 7-8)

5. Parties included county agencies, county officials, private individuals and a public corporation. (R at 13)

6. Sundance Recreational Resort Plat "A" Amended [5], (the Plat), was approved by the Board of County Commissioners of Utah County. (R at 8)

SUMMARY OF THE ARGUMENT

I

This action was dismissed for failure to exhaust administrative remedies and failure to comply with the Utah

Governmental Immunity Act. Appellant followed the procedural requirements in making an appeal to the Board of Adjustment and then bringing an appeal to the district court when his appeal before the Board of Adjustment was denied. The Board of Adjustment denied Appeal 1052, that it had no holding jurisdiction to review his claim. Because the Board of Adjustment denies jurisdiction to review Building Permits, abatement of Permit 8780 was sought directly. As part of this appeal, plaintiff seeks declaration of rights and determination with regard to those actions which the Board of Adjustment has stated it has no jurisdiction to hear.

In addition the above, Appellant has brought an action to abate a Plat for which no administrative appeal process existed at the time this action was brought. Statutory and other requirements for exhaustion of administrative remedies having been met, there were no grounds for dismissal. It must therefore be set aside.

II

Appellant brought this action under authority of Utah Code Annotated Section 78-33-2 for declaration of individual rights as to which actions may be brought before the Board of Adjustment, as well as Utah Code Annotated Section 17-27-23 for abatement of a plat and building permit. Appeal from denials by the Board of Adjustment must be filed within thirty (30) days of such denial. No other requirements were mandated by the statute with regard to undertakings, notice or any other procedures. There neither is nor was a statutory requirement that provisions of the Governmental

Immunity Act be observed when taking an appeal from a decision by the Board of Adjustment.

The Governmental Immunity Act serves the dual purposes of waiving stated and municipal immunity from monetary claims due to negligence and standardizing procedures for bringing claims for money or damages under negligence, property or contract actions. Because the Governmental Immunity Act does not apply to plaintiff, dismissal was improper.

ARGUMENT

I. STANDARD OF REVIEW

Sundance Development Corporation is the primary owner of a recreational resort located in Northfork Canyon of the Provo River behind Mount Timpanogos. (R at 11) As such, it is subject to the Utah County Zoning Ordinance and specifically to the provisions of the recreational resorts, chapter 6-5. In the summer of 1991, Sundance Development Corporation began construction on sewer lines and moving stream beds without a permit or permission from the Board of County Commissioners. Neither were all improvements located on the Plat or approved by the Board of County Commissioners. (R at 8)

Appellant brought the failure of Defendant Sundance Development Corporation to obtain proper permits and approvals prior to beginning construction to the attention of the Utah County Planning Department, the Planning Commission and the Utah County Board of County Commissioners. No action was taken with regard to

Sundance Development Corporation's failure to comply with the zoning ordinance other than to issue building permits to cover ongoing and complete work. Sundance Development Corporation then proceeded to seek approval of a new plat, Sundance Recreational Resort Plat "A" Amended [5] (the Plat). It was approved by the Board of County Commissioners and Planning Commission on or about October 16, 1991. Building Permit 8663 was issued to legitimize several improvements complained of by Appellant. No variance was issued regarding Permit 8663 although the improvements materially violated the Utah County Zoning Ordinance. (R at 4) Following issuance of Permit 8663, appellant timely appealed this act to the Board of Adjustment of Utah County to have the building permit issued by the Planning Department vacated for failure to apply for variance prior to application for the building permit. (R at 34) On December 5, 1991, the Board of Adjustment entered the following denial of appeal.

> That the Board of Adjustment deny the appeal application that an error was made by the Zoning Administrative, based on the following findings: (1) the Zoning Administrative acted under the direction of the Planning Commission and therefore cannot be acted upon by the Board. (2) Appeals from decisions of the Planning Commission should go directly to the court, not to the co-equal Board of Adjustment which has partially common membership. (3) Permit 8663 to be corrected to have the ownership changed to have the proper entity. (R at 34)

Aside from the self-contradictory actions of the Board of Adjustment which state that they cannot act upon Appeal 8663 because it calls into question the actions of the Zoning Administrator and at the same times directs that Permit 8663 have

the ownership information corrected by the thereon, presumably same Zoning Administrator, the effect of the actions of the Board of Adjustment was to deny its statutory-jurisdiction to grant or deny variances for building permits.

Appellant then timely filed this action to appeal the denial of Appeal 1052 by the Board of Adjustment. (R at 2) Because the refusal to exercise jurisdiction by the Board of Adjustment was decided under a "statute [or] municipal ordinance", appellant brought a declaratory rights action under Utah Code Annotated Section 78-33-2. Appellant also brought, pursuant to Utah Code Annotated Section 17-27-23, an action to abate the Plat to the extent that it violates the Utah County Zoning Ordinance and to abate building Permits 8780 and 8663 which are both based upon the Plat. (R at 8-13) On May 13, 1992, the trial court entered the following rule dismissing appellant's action:

> The court hereby grants defendants' motion. Plaintiff has failed to exhaust his administrative remedies prior to instigating this legal action. He must first appeal his grievance to the Utah County Board of Adjustments. In addition, even if plaintiff did not need to exhaust administrative remedies before seeking legal redress, he has failed to comply with the requirements of the Utah Governmental Immunity Act, Utah Code Annotated Section 63-30-1 et seq. (R at 96)

After appellant's Motion for New Trial was denied, appellant timely brought this appeal. (R at 137) In Avila v. Winn, 794 P.2d 20,22 (Utah 1990) the court held that "

> Questions of whether a party has failed to comply with the requirements of a statute and the rules of civil procedure sufficient to justify dismissal are question of law, and on appeal, we accord no particular deference to the determinations of law made by the trial court but review them for correctness. Avila, 794 P.2d at 22.

In as much as this appeal is based upon a dismissal for failure to comply with rules of procedure and statutes, the court is presented with a question of law. The trial court's decision must therefore be granted no particular deference.

In determining which facts to rely upon in an appeal from dismissal, in Arrow Indus. vs. Zions First Nat. Bank, 767 P.2d 935 (Utah 1988), the court held that:

> A motion to dismiss is only appropriate where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of its claim. In reviewing an order granting a motion to dismiss, we are obliged to construe the complaint in the light most favorable to the plaintiff and to indulge all reasonable inferences in its favor. Arrow Indus., 767 P.2d at 936.

The facts must therefore be viewed in the light most favorable to Appellant.

POINT II

A. Administrative Remedies With Regard To Appeal No. 1052 Were Exhausted.

The primary basis for dismissal of this action was failure to exhaust administrative remedies. (R at 96) . This Ruling, however, is contrary to the facts and is without any basis. Appellant brought Appeal No. 1052 before the Board of Adjustment of Utah County pursuant to the Utah County Zoning Ordinance and within the time limits therein regarding Building Permit 8663. On December 5, 1991, the Board of Adjustment denied Appeal No. 1052. (R at 34) Utah County Zoning Ordinance Section 7-24 RECOURSE FROM ACTIONS TAKEN BY THE BOARD, provides as follows:

> Any person or persons, jointly or severely, aggrieved by any action of the Board of Adjustment, or any tax payer, or any office, department, board, or agency of the county, may have and maintain a plenary action for relief therefrom in any court of record to having competent jurisdiction, provided that petition for such relief is presented to the court within thirty (30) days after the filing of such decision in the office of the Board of Adjustment. Unless such petition for relief is presented to the court within said thirty (30) days, a decision of the Board of Adjustment shall be final. No decision of the Board of Adjustment shall be subject to rehearing, except when remanded from a county (SIC) of competent jurisdiction.

An appeal to the District Court is the only remedy available after denial of appeal by the Board of Adjustment. Appellant then filed this action January 2, 1992, which was within thirty (30) days of the denial of Appeal 1052. (R at 2) Appellant has therefore complied with all requirements of the statute and zoning ordinance and has exhausted his administrative remedies in seeking to have an action of the Zoning Administrator and the issuance of a building permit set aside. Dismissal was therefore improper regarding Appeal 1052.

B. Administrative Remedies Were Exhausted With Regard To The Plat

As part of this action, appellant sought to have Sundance Recreational Resort Plat "A" Amended [5] abated. (R at 8) The Plat was approved by the Utah County Commission. Utah County Zoning Ordinance Section 7-15 provides as follows:

APPEALS TO THE BOARD OF ADJUSTMENT

Any person, organization, corporation, or unit or department of government which has been aggrieved by a decision allegedly made in error by an administrative officer or agency; or requesting an interpretation of the zoning map; or wishing to make an appeal for a special exception or variance; may do so by filing a formal request in writing with the Zoning Administrator. The application shall be accepted by the Zoning Administrator only if accompanied by a non-refundable fee of the current amount as set by the Legislative Body, and if the application form has been properly filed within forty-five (45) days after the contested action of the administrative officer or agency. The application requesting to appear before the Board of Adjustment shall be made on forms furnished by the Zoning Administrator at least fifteen (15) days prior to the date of the hearing of the appeal.

The Board of Adjustment can only hear appeals from "a decision allegedly made in error by an administrative office of agency; or requesting an interpretation of the zoning map; or wishing to make an appeal for a special exception or variance." Utah County Zoning Ordinance Section 2-2 B 1 defines administrative agency as "the Utah County Planning Department, excluding the appointed Planning Commission". Utah County Zoning Ordinance Section 2-2 B 2 defines administrative officer as "the Planning Director, the Zoning Administrator or any of their duly appointed designees." The only appeals, therefore, that can be heard by the Board of Adjustment are from acts by the Planning Department or the Planning Director, the Zoning Administrator or appointed designees of them. No appeal may be had from an act by either the Planning Commission, which is expressly not an administrative agency, or the Board of County Commissioners, which is an elected body, and not a part of the

Planning Department U.C.A. 17-5-2. The Plat was recommended for approval by the Planning Commission and it was approved by the Board of County Commissioners for Utah County. (R at 6) There was no provision for review of plats approved by the Board of County Commissioners at the time this action was brought, and the administrative remedies regarding the Plat were exhausted therefore by appellant prior to the filing of this action on January 2, 1992. Appellant having exhausted his administrative remedies with regard to the Plat, dismissal was improper.

C. Appeal of Building Permit 8780 is excused for futility.

Appellant also brought Building Permit 8780 for abatement as part of this action. Appellant does not dispute that he did not appeal the issuance of Building Permit 8780 to the Board of Adjustment, but claims that such an act would have been useless and therefore unnecessary.

As part of its ruling denying Appeal 1052, the Board of Adjustment stated that it did not have jurisdiction to review building permits issued by the Zoning Administrator. (R at 34) The Board of Adjustment held that "the Zoning Administrator acted under the direction the Planning commission and therefor (SIC) can not be acted upon by the Board." (R at id) As Building Permit 8780 arose under exactly the same type of circumstances, appellant could only expect to have a denial based upon lack of jurisdiction entered by the Board of Adjustment. The courts in Utah have long recognized that the doctrine of exhaustion of administrative remedies has an

important exception; that is, that no useless act will be required. A party will not be required to waste time and resources if the end result is a foregone conclusion. See In Re: Tanner, 549 P.2d 703 (Utah 1976); and State Tax Commission vs. Verson, 782 P. 2d 519 (Utah 1989).

Because the Utah County Board of Adjustment ruled itself to be without jurisdiction to hear Appeal 1052 regarding Building Permit 8663 (R at id), it was very unlikely to find itself with jurisdiction to review Building Permit 8780. It would have been a waste of appellant's money and time to pay the filing fee, prepare the appeal, attend the Board of Adjustment's meeting, present his case, and then be denied for lack of jurisdiction. Dismissal was therefore improper with regard to Permit 8780 also.

POINT III

A. The Utah Governmental Immunity Act Does Not Apply To This Action.

The trial court dismissed this action by also relying on the Utah Governmental Immunity Act, Chapter 30 of Title 63 of the Utah Code. (R at 96) However, the Utah Governmental Immunity Act (the Act) is limited in scope and only applies to certain types of actions. Utah Code Annotated Section 63-30-2(1) defines a claim as:

> "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.(Underline added)

Only money or damage claims are controlled by the Act. The Act then lists numerous procedural requirements for bringing a claim.

Utah Code Annotated Section 63-30-11 sets out the notice requirements with regard to information to be provided to the government on claims. Sections 63-30-12 and 63-30-13 establish the time limits for bringing a claim against either the State or a political subdivision thereof. Section 63-30-14 provides that a notice within ninety (90) days will be given as to approval or denial of the claim the from which runs a separate one (1) year time period in which a "claim" may be brought under U.C.A. Section 63-30-15. Section 63-30-19 also requires an undertaking to be provided. The key to all these procedural bars upon which the District Court dismissed this action is the word "claim". Utah Code Annotated Section 63-30-11 is limited to:

> (1) "CLAIM" arises when the statute of limitations that would apply if the claim were against a private person beings to run.
>
> (2) Any person having a "CLAIM" for injury...

U.C.A. 63-30-12 is limited to "[A] `CLAIM' against the state..." U.C.A. 63-30-13 is limited to "[A] `CLAIM' against a political subdivision..." U.C.A. 63-30-14 limits itself to "Within ninety days of the filing of a `CLAIM'..." U.C.A. 63-30-15 only discusses whether "the CLAIM" is denied. U.C.A. 63-30-19 refers to actions brought under this chapter. From a review of the intended breath of this chapter by the word claim, and the limitation of all of the procedures to claims which are "for money or damages", application of the Act to this action was improper.

Statutes are examined as a whole (Schurtz v. BMW of North America, Inc., 814 P.2d 1108, 1112 (Utah 1991)), the whole legislative scheme, as it exists, must be compared to Appellant's action. The body of the Act only refers to money and damage actions. U.C.A. Section 63-30-5 waives immunity for contractual obligations, and expressly waives procedural claim requirements as identified above. U.C.A. Sections 63-30-6 and 10.5 waive immunity regarding real and personal property ownership. U.C.A. Sections 63-30-8 thru 10 waive immunity regarding injury due to negligence.

Appellant, however, has brought no action for either money or damages against a political subdivision of the State or the State of Utah. Appellant's prayer for relief requests only the following:

1. Abatement of Building Permit 8780;

2. Declaration of rights of appellant with regard to appeal to the Board of Adjustment of actions by the Zoning Administrator;

3. Declaration of rights with regard to Permit 8663 and the originals and that the Utah County Board of Adjustment has original sole jurisdiction to grant and hear variances;

4. Abatement of the plat; and

5. That the Utah County officials and agencies be ordered to comply with the Zoning Ordinance. (R at 7-8)

Because none of Appellant's requests are for damages or for money, the Utah Governmental Immunity Act does not apply to this action.

B. Appellant Has Brought This Action As A Private Attorney General.

Utah Code Annotated Section 17-27-23 (1991) provides the following authority for bringing an action for violation of the Zoning Ordinance:

> Violation of Chapter 27, Title 17, or of any adopted county zoning, subdivision, or official map ordinance is punishable as a class C misdemeanor. The Board of County Commissioners, the County Attorney or <u>any owner of real estate within the county</u> in which such violation occurs, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement or any other appropriate action or proceedings to prevent, enjoin, abate, or remove the unlawful building, use or act. (Underline added)

Appellant is the owner of real property located in Utah County, State of Utah. (R at 87) The legislature granted authority to owners of real property to act in the same capacity as the County Attorney and therefore to act as private attorneys general with regard to enforcement of zoning ordinances. There is no reference herein to the Utah Governmental Immunity Act. However, there is a broad grant of power to "institute injunction, mandamus, abatements or any other appropriate action or proceedings"... Utah County Zoning Ordinance Section 7-29 granted owners of real property the same right under the Zoning Ordinance.

Appellant, as a private attorney general, has sought to abate Building Permit 8780, abate the Plat, and seeks mandamus whereby the County officials and agencies are ordered to comply with the Zoning Ordinance and enforcement thereof. (R at 7-8) Since a clear statutory grant of equitable power has been made by the

legislature, as well as a grant of the power of private attorney general to protect the equitable value of an individual's property from improper acts by any individual, to include County officials and County agencies, the only explicit legislatively imposed limits must be met to exercise this right. The trial court has sought to abridge this grant of authority to the owners of real property by engrafting the provisions of the Utah Governmental Immunity Act onto this section. (R at 96)

The trial court has implicitly interpreted the statutes in question to include the Governmental Immunity Act by reference. In reviewing interpretation of statutes by the trial court, a no deference is granted to the trial court and a "correction of error" standard is used. See Ketchum, Konkel, et al v. Heritage Mtn, 784 P.2d 1217,1220 (Utah App. 1989).

In Reeves v. Gentile, 813 P.2d 111 (Utah 1991), the court held that:

> The primary rule of statutory construction is to give effect to the intent of the legislature in light of the purpose of the statute was meant to achieve. Reeves, 813 P.2d at 115.

Applying that rule to the Governmental Immunity Act, the statute sets out orderly provisions for the processing and review of money and damage claims. It is not ambiguous, and is limited to this purpose.

The Declaratory Judgment Act, U.C.A. 78-33-1 et seq is for the equitable determination of rights under statute. U.C.A. 17-27-23 grants authority to landowners the power to act as attorneys

general on an equal footing with the county attorney. The legislative purpose of both of these statutes is to allow individuals to protect their rights, either by a declaratory judgment action regarding personal obligations and rights, U.C.A. 78-33-2, or to protect equitable real property interests, U.C.A. 17-27-23. These statutes and the Governmental Immunity Act have only one thing in common, the state may be a defendant.

In as much as the major purposes of these statutes are distinct and separate, engrafting the claims control requirements on these rights statutes is improper.

C. The Utah Governmental Immunity Act Does Not Apply To Appeals.

The court did not state upon what grounds it was including the requirement that the Utah Governmental Immunity Act be applied to appeals from the Board of Adjustment. However, a review Utah Rules of Appellate Procedure Rule 14 provides in material part that:

> [A] Petition for review shall be filed with the clerk of teh appellate court within the time prescribed by statute, or if there is no time prescribed, then within 30 days after the date of the written decision or order.

The court, by its Rules of Appellate Procedure, does not require that appeals from orders and decisions of administrative bodies be subject to the Utah Governmental Immunity Act. The default for appeal of thirty (30) days indicates that no ninety (90) day limit and notice requirement exists.

The reason for this is obvious. An administrative agency, in this action, the Utah County Board of Adjustment, has been aware for a significant period of time of the basis of the potential

action, as well as having had all of the facts argued before it. (R at 34) Giving it an additional ninety (90) days within which to decide whether or not there is a valid claim, after it has issued a formal decision, would be to allow it to reverse its decisions in an informal appellate procedure which is not provided for either by statute or ordinance. It would not be fair to a party adversely effected by a reversal of the decision in private, and would therefore be a violation of due process rights.

Because the administrative agency is well aware of the basis of the action, there being no money or other damages sought (R at 7-8), and that granting an agency an additional ninety (90) days pursuant to Utah Code Annotated Section 63-30-14 to review and perhaps change its decision would serve no permissible purpose, it is simply illogical to engraft the Act onto appeals from the decisions of administrative agencies.

D. The Act Does Not Apply To Declaratory Judgment Actions

Appellant brought his Complaint partially in the nature of a declaratory judgment action, U.C.A.Section 78-33-1 et seq (Declaratory Judgment Act). (R at 7-8) Utah Code Annotated Section 78-33-2 provides as follows:

> Any person interested under a deed, will or written contract, or whose rights, status or other legal relations are effected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Appellant, as an owner of real property in Utah County, wished

to know whether the Board of Adjustment will hear his appeals regarding improper issuance of building permits, or whether such action should be brought only in the District Court. (R at 7-8,13) Appellant has been told by the Board of Adjustment that he can only bring the action in the District Court. (R at 34) Appellant has also been told by the District Court that he cannot bring the action in the District Court. (R at 96) The District Court has engrafted the Utah Governmental Immunity Act onto the Declaratory Judgments Act as an additional requirement for having an equitable decision reached regarding his available rights.

In American Tierra v. City of West Jordan, 186 Utah Advance Report 3 (Utah 1992), the court held that:

> This court long has recognized a common law exception to governmental immunity for equitable claims. American Tierra, 186 Utah Advance Report at 4.

Declaratory Judgment actions are equitable in nature as they are solely to determine relationships and are not necessarily for "money or damages". Dismissal was therefore improper in as much as the Utah Governmental Immunity Act does not apply to equitable actions such as has been brought by appellant.

E. This Action Was Brought Under Separate Statutory Authority

Finally, Appellant points out the fact that each of his claims was brought under an express grant of authority not contained within the Utah Governmental Immunity Act. His declaratory judgment action was brought under Utah Code Annotated Section 78-33-1. His

abatement action was brought under Utah Code Annotated Section 17-27-23 (1991). Appellant's appeal from denial of Appeal 1052 by the Utah County Board of Adjustment was brought under Utah County Zoning Ordinance Section 7-24.

In Adkins vs. Division of State Land, 719 P.2d 524 (Utah 1986), the trial court dismissed plaintiff's action for failure to comply with the Utah Governmental Immunity Act. Plaintiff had brought his action under a separate statute, and had failed to meet the requirements of the Utah Governmental Immunity Act as a result. The court held that:

> We believe that court's reliance upon the Government Immunity Act was misplaced...We find nothing in the Immunity Act which indicates that the legislature intended to impose the requirement of filing a claim with the Attorney General when the claimant was pursuing a dispute which by statute had been made cognissable by an administrative body. This view is consistent with our decision in Archer v. Utah State Land Board, 15 Utah 2d 321, 396 P.2d 622 (1964) where he held that governmental immunity was not a defense for a writ of mandamus to compel the defendant Land Board to comply with its statutory duty to issue and oil and gas lease to the plaintiff. In that case, we distinguished Wilkinson v. State, 42 Utah 483, 134 P 626 (1913) where we held that governmental immunity barred an action for *damage* against the State caused by waters escaping from a canal owned and controlled by the Board Land Commissioners.
>
> Section 65-1-9(2) expressly authorized judicial review of decision of the "board". We find no persuasive reason why we should engraft upon that subsection the requirement of filing and undertaking as required by Section 63-30-19, which applies to the filing of actions on claims against he State where immunity once existed but which has been expressly waived by the Governmental Immunity Act. That is not the situation in the instant case where we are dealing with an appeal from an administrative agency to the courts as authorized by statute. Adkins, 719 P.2d at 525-526. (Italics in original)

The trial court has sought to engraft unauthorized road blocks and procedural difficulties onto specific grants of statutory authority which are available to appellant. This engraftment has caused appellant unnecessary and undue delay and expense in the vindication of his rights. The dismissal should therefore be set aside as contrary to established State law.

CONCLUSION

The trial court dismissed this action for failure to exhaust administrative remedies and for failure to comply with the Governmental Immunity Act. The administrative remedies were exhausted with regard to Building Permit 8663 under Appeal 1052 and the Plat. It would be an act of futility to have appealed to the Board of Adjustment Building Permit 8780 in as much as the Board of Adjustment declined jurisdiction to hear the issue with regard to Appeal 1052. As useless acts are not required prior to appeal, appeal of Building Permit 8780 is therefore proper. Dismissal on this ground is therefore improper.

There is no basis for the application of the Utah Governmental Immunity Act to the present action. Appellant is not seeking either money or damages. The Utah Governmental Immunity Act, by its terms, only applies to actions for money or damages. In addition, appellant is seeking relief under separate statutory grant which does not expressly include the Governmental Immunity Act and is contrary to establish State law under Adkins. Appellant also seeks equitable remedies which are traditionally not required to conform

to the Governmental Immunity Act Guidelines. Finally, appeal from denial of Appeal 1052 before the Board of Adjustment is an appeal from the ruling of an administrative body, and therefore not under the jurisdiction and guidelines of the Governmental Immunity Act.

In as much as dismissal has no basis in law, it should therefore be set aside and new trial granted.

DATED this 23 day of December, 1992.

Richard C Coxson

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid to:

Mark Brady
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Ronald E. Nehring
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Salt Lake City, UT 84111

DATED this 23 day of December, 1992.

Richard C Coxson

RICHARD C. COXSON
Attorney for Appellant

ADDENDUM 1

63-30-1. Short title.

This act shall be known and may be cited as the "Utah Governmental Immunity Act." 1965

63-30-2. Definitions.

As used in this chapter:

(1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.

(2) (a) "Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, officers and employees in accordance with Section 62A-4-603, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter..

(4) (a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

(5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.

(6) "Personal injury" means an injury of any kind other than property damage.

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

(8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.

(9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state. 1991

63-30-3. Immunity of governmental entities from suit.

(1) Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

(2) (a) For the purposes of this chapter only, the following state medical programs and services performed at a state-owned university hospital are unique or essential to the core of governmental activity in this state and are considered to be governmental functions:

(i) care of a patient referred by another hospital or physician because of the high risk nature of the patient's medical condition;

(ii) high risk care or procedures available in Utah only at a state-owned university hospital or provided in Utah only by physicians employed at a state-owned university acting in the scope of their employment;

(iii) care of patients who cannot receive appropriate medical care or treatment at another medical facility in Utah; and

(iv) any other service or procedure performed at a state-owned university hospital or by physicians employed at a state-owned university acting in the scope of their employment that a court finds is unique or essential to the core of governmental activity in this state.

(b) If any claim under this subsection exceeds the limits established in Section 63-30-34, the

claimant may submit the excess claim to the Board of Examiners and the Legislature under Title 63, Chapter 6.

(3) The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

(4) Officers and employees of a Children's Justice Center are immune from suit for any injury which results from their joint intergovernmental functions at a center created in Title 62A, Chapter 4. 1991

63-30-4. Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.

(1) (a) Nothing contained in this chapter, unless specifically provided, may be construed as an admission or denial of liability or responsibility by or for governmental entities or their employees.

(b) If immunity from suit is waived by this chapter, consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person.

(c) No cause of action or basis of liability is created by any waiver of immunity in this chapter, nor may any provision of this chapter be construed as imposing strict liability or absolute liability.

(2) Nothing in this chapter may be construed as adversely affecting any immunity from suit that a governmental entity or employee may otherwise assert under state or federal law.

(3) (a) Except as provided in Subsection (b), an action under this chapter against a governmental entity or its employee for an injury caused by an act or omission that occurs during the performance of the employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy.

(b) A plaintiff may not bring or pursue any other civil action or proceeding based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless:

(i) the employee acted or failed to act through fraud or malice; or

(ii) the injury or damage resulted from the conditions set forth in Subsection 63-30-36(3)(c).

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice. 1991

63-30-5. Waiver of immunity as to contractual obligations.

(1) Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to the requirements of Sections 63-30-11, 63-30-12, 63-30-13, 63-30-14, 63-30-15, or 63-30-19.

(2) Notwithstanding Subsection (1), the Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development Act, if the failure to deliver the contractual amount of water is due to drought, other natural condition, or safety condition that causes a deficiency in the amount of available water. 1991

63-30-6. Waiver of immunity as to actions involving property.

Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved. 1965

63-30-7. Repealed. 1991

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them. 1991

63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement — Exception.

Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir, or other public improvement. 1991

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions.

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of:

(1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

(2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;

(3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;

(4) a failure to make an inspection or by making an inadequate or negligent inspection;

(5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;

(6) a misrepresentation by an employee whether or not it is negligent or intentional;

(7) or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;

(8) or in connection with the collection of and assessment of taxes;

(9) the activities of the Utah National Guard;

(10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;

(11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the Board of State Lands and Forestry;

(12) research or implementation of cloud management or seeding for the clearing of fog;

(13) the management of flood waters, earthquakes, or natural disasters;

(14) the construction, repair, or operation of flood or storm systems;

(15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;

(16) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them;

(17) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement; or

(18) the activities of:

(a) providing emergency medical assistance;

(b) fighting fire;

(c) regulating, mitigating, or handling hazardous materials or hazardous wastes;

(d) emergency evacuations; or

(e) intervening during dam emergencies.

1991

63-30-10.5. Waiver of immunity for taking private property without compensation.

(1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation.

(2) Compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain. 1991

63-30-10.6. Attorneys' fees for records requests.

(1) Immunity from suit of all governmental entities is waived for recovery of attorneys' fees under Sections 63-2-405 and 63-2-802.

Notwithstanding Section 63-30-11:

(a) a notice of claim for attorneys' fees under Subsection (1) may be filed contemporaneously with a petition for review under Section 63-2-404; and

(b) Sections 63-30-14 and 63-30-19 shall not apply.

(2) Any other claim under this chapter that is related to a claim for attorneys' fees under Subsection (1) may be brought contemporaneously with the claim for attorneys' fees or in a subsequent action. 1992

63-30-11. Claim for injury — Notice — Contents — Service — Legal disability.

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.

(3) (a) The notice of claim shall set forth:

(i) a brief statement of the facts;

(ii) the nature of the claim asserted; and

(iii) the damages incurred by the claimant so far as they are known.

(b) The notice of claim shall be:

(i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and

(ii) directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.

(4) (a) If the claimant is under the age of majority, or mentally incompetent and without a legal guardian at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim.

(b) (i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.

(ii) The court may not grant an extension that exceeds the applicable statute of limitations.

(c) In determining whether or not to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits. 1991

63-30-12. Claim against state or its employee — Time for filing notice.

A claim against the state, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental. 1987

63-30-13. Claim against political subdivision or its employee — Time for filing notice.

A claim against a political subdivision, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the governing body of the political subdivision within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental. 1987

63-30-14. Claim for injury — Approval or denial by governmental entity or insurance carrier within ninety days.

Within ninety days of the filing of a claim the governmental entity or its insurance carrier shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have

been denied if at the end of the ninety-day period the governmental entity or its insurance carrier has failed to approve or deny the claim. 1965

63-30-15. Denial of claim for injury — Authority and time for filing action against governmental entity.

(1) If the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.

(2) The claimant shall begin the action within one year after denial of the claim or within one year after the denial period specified in this chapter has expired, regardless of whether or not the function giving rise to the claim is characterized as governmental. 1987

63-30-16. Jurisdiction of district courts over actions — Application of Rules of Civil Procedure.

The district courts shall have exclusive original jurisdiction over any action brought under this chapter, and such actions shall be governed by the Utah Rules of Civil Procedure in so far as they are consistent with this chapter. 1983

63-30-17. Venue of actions.

Actions against the state may be brought in the county in which the claim arose or in Salt Lake County. Actions against a county may be brought in the county in which the claim arose, or in the defendant county, or, upon leave granted by a district court judge of the defendant county, in any county contiguous to the defendant county. Leave may be granted ex parte. Actions against all other political subdivisions including cities and towns, shall be brought in the county in which the political subdivision is located or in the county in which the claim arose. 1983

63-30-18. Compromise and settlement of actions.

(1) A political subdivision, after conferring with its legal officer or other legal counsel if it does not have a legal officer, may compromise and settle any action as to the damages or other relief sought.

(2) The risk manager in the Department of Administrative Services may:

(a) compromise and settle any claim of $25,000 or less in damages filed against the state for which the Risk Management Fund may be liable; and

(b) with the concurrence of the attorney general or his representative and the executive director of the Department of Administrative Services, compromise and settle any claim of more than $25,000 in damages for which the Risk Management Fund may be liable. 1990

63-30-19. Undertaking required of plaintiff in action.

At the time of filing the action the plaintiff shall file an undertaking in a sum fixed by the court, but in no case less than the sum of $300, conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment. 1965

63-30-20. Judgment against governmental entity bars action against employee.

Judgment against a governmental entity in an action brought under this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee whose act or omission gave rise to the claim. 1965

63-30-21. Repealed. 1978

63-30-22. Exemplary or punitive damages prohibited — Governmental entity exempt from execution, attachment, or garnishment.

(1) (a) No judgment may be rendered against the governmental entity for exemplary or punitive damages.

(b) The state shall pay any judgment or portion of any judgment entered against a state employee in the employee's personal capacity even if the judgment is for or includes exemplary or punitive damages if the state would be required to pay the judgment under Section 63-30-36 or 63-30-37.

(2) Execution, attachment, or garnishment may not issue against a governmental entity. 1991

63-30-23. Payment of claim or judgment against state — Presentment for payment.

Any claim approved by the state as defined by Subsection 63-30-2(1) or any final judgment obtained against the state shall be presented to the state risk manager, or to the office, agency, institution or other instrumentality involved for payment, if payment by said instrumentality is otherwise permitted by law. If such payment is not authorized by law then said judgment or claim shall be presented to the board of examiners and the board shall proceed as provided in Section 63-6-10. 1987

63-30-24. Payment of claim or judgment against political subdivision — Procedure by governing body.

Any claim approved by a political subdivision or any final judgment obtained against a political subdivision shall be submitted to the governing body thereof to be paid forthwith from the general funds of said political subdivision unless said funds are appropriated to some other use or restricted by law or contract for other purposes. 1965

63-30-25. Payment of claim or judgment against political subdivision — Installment payments.

If the subdivision is unable to pay the claim or award during the current fiscal year it may pay the claim or award in not more than ten ensuing annual installments of equal size or in such other installments as are agreeable to the claimant. 1965

63-30-26. Reserve funds for payment of claims or purchase of insurance created by political subdivisions.

Any political subdivision may create and maintain a reserve fund or may jointly with one or more other political subdivisions make contributions to a joint reserve fund, for the purpose of making payment of claims against the co-operating subdivisions when they become payable pursuant to this chapter, or for the purpose of purchasing liability insurance to protect the co-operating subdivisions from any or all risks created by this chapter. 1983

63-30-27. Tax levy by political subdivisions for payment of claims, judgments, or insurance premiums.

(1) Notwithstanding any provision of law to the contrary, all political subdivisions may levy an annual property tax sufficient to pay the following:

(a) any claim;

(b) any settlement;

(c) any judgment, including any judgment against an elected official or employee of any political subdivision, including peace officers, based upon a claim for punitive damages but the authority of a political subdivision for the payment of any judgment for punitive damages is limited in any individual case to $10,000;

(d) the costs to defend against any claim, settlement, or judgment; or

(e) the establishment and maintenance of a reserve fund for the payment of claims, settlements, or judgments as may be reasonably anticipated.

(2) It is legislative intent that the payments authorized for punitive damage judgments or to pay the premium for such insurance as authorized is money spent for a public purpose within the meaning of this section and Article XIII, Sec. 5, Utah Constitution, even though as a result of the levy the maximum levy as otherwise restricted by law is exceeded. No levy under this section may exceed .0001 per dollar of taxable value of taxable property. The revenues derived from this levy may not be used for any other purpose than those stipulated in this section. 1988

63-30-28. Liability insurance — Purchase of insurance or self-insurance by governmental entity authorized — Establishment of trust accounts for self-insurance.

(1) Any governmental entity within the state may purchase commercial insurance, self-insure, or self-insure and purchase excess commercial insurance in excess of the statutory limits of this chapter against any risk created or recognized by this chapter or any action for which a governmental entity or its employee may be held liable.

(2) (a) In addition to any other reasonable means of self-insurance, a governmental entity may self-insure with respect to specified classes of claims by establishing a trust account under the management of an independent private trustee having authority with respect to claims of that character to expend both principal and earnings of the trust account solely to pay the costs of investigation, discovery, and other pretrial and litigation expenses including attorneys' fees, and to pay all sums for which the governmental entity may be adjudged liable or for which a compromise settlement may be agreed upon.

(b) The monies and interest earned on said trust fund shall be subject to investment pursuant to Title 51, Chapter 7, State Money Management Act of 1974, and shall be subject to audit by the state auditor.

(3) Notwithstanding any law to the contrary, the trust agreement between the governmental entity and the trustee may authorize the trustee to employ counsel to defend actions against the entity and its employees and to protect and safeguard the assets of the trust, to provide for claims investigation and adjustment services, to employ expert witnesses and consultants, and to provide such other services and functions necessary and proper to carry out the purposes of the trust. 1991

63-30-29. Repealed. 1983

63-30-29.5. Liability insurance — Government vehicles operated by employees outside scope of employment.

A governmental entity that owns vehicles driven by employees of the governmental entity with the express or implied consent of the entity, but which, at the time liability is incurred as a result of an automobile accident, is not being driven and used within the course and scope of the driver's employment is considered to provide the driver with the insurance coverage required by Title 41, Chapter 12a. However, the liability coverages considered provided are the minimum limits under Section 31A-22-304. 1985

63-30-30. Repealed. 1978

63-30-31. Liability insurance — Construction of policy not in compliance with act.

Any insurance policy, rider or endorsement hereafter issued and purchased to insure against any risk which may arise as a result of the application of this chapter, which contains any condition or provision not in compliance with the requirements of the chapter, shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider or endorsement been in full compliance with this chapter, provided the policy is otherwise valid. 1983

63-30-32. Liability insurance — Methods for purchase or renewal.

No contract or policy of insurance may be purchased or renewed under this chapter except upon public bid to be let to the lowest and best bidder; except that the purchase or renewal of insurance by the state shall be conducted in accordance with the provisions of Sections 63-56-1 through 63-56-73. 1983

63-30-33. Liability insurance — Insurance for employees authorized — No right to indemnification or contribution from governmental agency.

(1) (a) A governmental entity may insure any or all of its employees against liability, in whole or in part, for injury or damage resulting from an act or omission occurring during the performance of an employee's duties, within the scope of employment, or under color of authority, regardless of whether or not that entity is immune from suit for that act or omission.

(b) Any expenditure for that insurance is for a public purpose.

(c) Under any contract or policy of insurance providing coverage on behalf of a governmental entity or employee for any liability defined by this section, regardless of the source of funding for the coverage, the insurer has no right to indemnification or contribution from the governmental entity or its employee for any loss or liability covered by the contract or policy.

(2) Any surety covering a governmental entity or its employee under any faithful performance surety bond has no right to indemnification or contribution from the governmental entity or its employee for any loss covered by that bond based on any act or omission for which the governmental entity would be obligated to defend or indemnify under the provisions of Section 63-30-36. 1991

63-30-34. Limitation of judgments against governmental entity or employee — Insurance coverage exception.

(1) (a) Except as provided in Subsection (2), if a judgment for damages for personal injury against a governmental entity, or an employee whom a

governmental entity has a duty to indemnify, exceeds $250,000 for one person in any one occurrence, or $500,000 for two or more persons in any one occurrence, the court shall reduce the judgment to that amount.

(b) A court may not award judgment of more than $250,000 for injury or death to one person regardless of whether or not the function giving rise to the injury is characterized as governmental.

(c) Except as provided in Subsection (2), if a judgment for property damage against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $100,000 in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the damage is characterized as governmental.

(2) The damage limits established in this section do not apply to damages awarded as compensation when a governmental entity has taken or damaged private property for public use without just compensation. 1991

63-30-35. Expenses of attorney general, general counsel for state judiciary, and general counsel for the Legislature in representing the state, its branches, members, or employees.

(1) (a) After consultation with appropriate state agencies, the state risk manager shall provide a comprehensive liability plan, with limits not lower than those set forth in Section 63-30-34, that will protect the state and its indemnified employees from claims and liability.

(b) The risk manager shall establish deductibles and maximum limits of coverage in consultation with the executive director of the Department of Administrative Services.

(2) (a) The Office of the Attorney General has primary responsibility to provide legal representation to the judicial, executive, and legislative branches of state government in cases where Risk Management Fund coverage applies.

(b) When the attorney general has primary responsibility to provide legal representation to the judicial or legislative branches, the attorney general shall consult with the general counsel for the state judiciary and with the general counsel for the Legislature, to solicit their assistance in defending their respective branch, and in determining strategy and making decisions concerning the disposition of those claims. The decision for settlement of monetary claims in those cases, however, lies with the attorney general and the state risk manager.

(3) (a) If the Judicial Council, after consultation with the general counsel for the state judiciary, determines that the Office of the Attorney General cannot adequately defend the state judiciary, its members, or employees because of a conflict of interest, separation of powers concerns, or other political or legal differences, the Judicial Council may direct its general counsel to separately represent and defend it.

(b) If the general counsel for the state judiciary undertakes independent legal representation of the state judiciary, its members, or employees, the general counsel shall notify the state risk manager and the attorney general in writing before undertaking that representation.

(c) If the state judiciary elects to be represented by its own counsel under this section, the decision for settlement of claims against the state judiciary, its members, or employees, where Risk Management Fund coverage applies, lies with the general counsel for the state judiciary and the state risk manager.

(4) (a) If the Legislative Management Committee, after consultation with general counsel for the Legislature, determines that the Office of the Attorney General cannot adequately defend the legislative branch, its members, or employees because of a conflict of interest, separation of powers concerns, or other political or legal differences, the Legislative Management Committee may direct its general counsel to separately represent and defend it.

(b) If the general counsel for the Legislature undertakes independent legal representation of the Legislature, its members, or employees, the general counsel shall notify the state risk manager and the attorney general in writing before undertaking that representation.

(c) If the legislative branch elects to be represented by its own counsel under this section, the decision for settlement of claims against the legislative branch, its members, or employees, where Risk Management Fund coverage applies, lies with the general counsel for the Legislature and the state risk manager.

(5) (a) Notwithstanding the provisions of Section 67-5-3 or any other provision of this code, the attorney general, the general counsel for the state judiciary, and the general counsel for the Legislature may bill the Department of Administrative Services for all costs and legal fees expended by their respective offices, including attorneys' and secretarial salaries, in representing the state or any indemnified employee against any claim for which the Risk Management Fund may be liable and in advising state agencies and employees regarding any of those claims.

(b) The risk manager shall draw funds from the Risk Management Fund for this purpose. 1990

63-30-36. Defending government employee — Request — Cooperation — Payment of judgment.

(1) Except as provided in Subsections (2) and (3), a governmental entity shall defend any action brought against its employee arising from an act or omission occurring:

(a) during the performance of the employee's duties;

(b) within the scope of the employee's employment; or

(c) under color of authority.

(2) (a) Before a governmental entity may defend its employee against a claim, the employee shall make a written request to the governmental entity to defend him:

(i) within ten days after service of process upon him; or

(ii) within a longer period that would not prejudice the governmental entity in maintaining a defense on his behalf; or

(iii) within a period that would not conflict with notice requirements imposed on the entity in connection with insurance carried by the entity relating to the risk involved.

(b) If the employee fails to make a request, or fails to reasonably cooperate in the defense, the governmental entity need not defend or continue to defend the employee, nor pay any judgment, compromise, or settlement against the employee in respect to the claim.

(3) The governmental entity may decline to defend, or subject to any court rule or order, decline to continue to defend, an action against an employee if it determines:

(a) that the act or omission in question did not occur:

(i) during the performance of the employee's duties;

(ii) within the scope of his employment; or

(iii) under color of authority;

(b) that the injury or damage resulted from the fraud or malice of the employee; or

(c) that the injury or damage on which the claim was based resulted from:

(i) the employee driving a vehicle, or being in actual physical control of a vehicle:

(A) with a blood alcohol content equal to or greater by weight than the established legal limit;

(B) while under the influence of alcohol or any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(C) while under the combined influence of alcohol and any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(ii) the employee being physically or mentally impaired so as to be unable to reasonably perform his job function because of the use of alcohol, because of the nonprescribed use of a controlled substance as defined in Section 58-37-4, or because of the combined influence of alcohol and a nonprescribed controlled substance as defined by Section 58-37-4.

(4) (a) Within ten days of receiving a written request to defend an employee, the governmental entity shall inform the employee whether or not it shall provide a defense, and, if it refuses to provide a defense, the basis for its refusal.

(b) A refusal by the entity to provide a defense is not admissible for any purpose in the action in which the employee is a defendant.

(5) Except as provided in Subsection (6), if a governmental entity conducts the defense of an employee, the governmental entity shall pay any judgment based upon the claim.

(6) A governmental entity may conduct the defense of an employee under a reservation of rights under which the governmental entity reserves the right not to pay a judgment, if the conditions set forth in Subsection (3) are established.

(7) (a) Nothing in this section or Section 63-30-37 affects the obligation of a governmental entity to provide insurance coverage according to the requirements of Subsection 41-12a-301(3) and Section 63-30-29.5.

(b) When a governmental entity declines to defend, or declines to continue to defend, an action against its employee under the conditions set forth in Subsection (3), it shall still provide coverage up to the amount specified in Sections 31A-22-304 and 63-30-29.5. 1991

63-30-37. Recovery of judgment paid and defense costs by government employee.

(1) Subject to Subsection (2), if an employee pays a judgment entered against him, or any portion of it, which the governmental entity is required to pay under Section 63-30-36, the employee may recover from the governmental entity the amount of the payment and the reasonable costs incurred in his defense.

(2) If a governmental entity does not conduct the defense of an employee against a claim, or conducts the defense under an agreement as provided in Subsection 63-30-36(6), the employee may recover from the governmental entity under Subsection (1) if:

(a) the employee establishes that the act or omission upon which the judgment is based occurred during the performance of his duties, within the scope of his employment, or under color of authority, and that he conducted the defense in good faith; and

(b) the governmental entity does not establish that the injury or damage resulted from:

(i) the fraud or malice of the employee;

(ii) the employee driving a vehicle, or being in actual physical control of a vehicle:

(A) with a blood alcohol content equal to or greater by weight than the established legal limit;

(B) while under the influence of alcohol or any drug to a degree that rendered the person incapable of safely driving the vehicle;

(C) while under the combined influence of alcohol and any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(iii) the employee being physically or mentally impaired so as to be unable to reasonably perform his job function because of the use of alcohol, because of the nonprescribed use of a controlled substance as defined in Section 58-37-4, or because of the combined use of alcohol and a nonprescribed controlled substance as defined in Section 58-37-4. 1987

63-30-38. Indemnification of governmental entity by employee not required.

If a governmental entity pays all or part of a judgment based on or a compromise or settlement of a claim against the governmental entity or an employee, the employee may not be required to indemnify the governmental entity for the payment. 1983

ADDENDUM 2

CHAPTER 33

DECLARATORY JUDGMENTS

78-33-1. Jurisdiction of district courts — Form — Effect.

The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree. 1953

78-33-2. Rights, status, legal relations under instruments or statutes may be determined.

Any person interested under a deed, will or written contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. 1953

78-33-3. Contracts.

A contract may be construed either before or after there has been a breach thereof. 1953

78-33-4. Suit by fiduciary or representative.

Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic or insolvent, may have a declaration of rights or legal relations in respect thereto:

(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or,

(2) to direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or,

(3) to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. 1953

78-33-5. Court's general powers.

The enumeration in Sections 78-33-2, 78-33-3 and 78-33-4 does not limit or restrict the exercise of the general powers conferred in Section 78-33-1 in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. 1953

78-33-6. Discretion to deny declaratory relief.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. 1953

78-33-7. Appeals and reviews.

All orders, judgments and decrees under this chapter may be reviewed as other orders, judgments and decrees. 1953

78-33-8. Supplemental relief.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. 1953

78-33-9. Trial of issues of fact.

When a proceeding under this chapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. 1953

78-33-10. Costs.

In any proceeding under this chapter the court may make such award of costs as may seem equitable and just. 1953

78-33-11. Parties.

When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal or county ordinance or franchise such municipality or county shall be made a party, and shall be entitled to be heard, and if a statute or state franchise or permit is alleged to be invalid the attorney general shall be served with a copy of the proceeding and be entitled to be heard. 1953

78-33-12. Chapter to be liberally construed.

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered. 1953

78-33-13. "Person" defined.

The word "person" wherever used in this chapter, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever. 1953

ADDENDUM 3

TITLE III. REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, COMMISSIONS, AND COMMITTEES.

Rule 14. Review of administrative orders: how obtained; intervention.

(a) **Petition for review of order; joint petition.** When judicial review by the Supreme Court or the Court of Appeals is provided by statute of an order or decision of an administrative agency, board, commission, committee, or officer (hereinafter the term "agency" shall include agency, board, commission, committee, or officer), a petition for review shall be filed with the clerk of the appellate court within the time prescribed by statute, or if there is no time prescribed, then within 30 days after the date of the written decision or order. The term "petition for review" includes a petition to enjoin, set aside, suspend, modify, or otherwise review a notice of appeal or a writ of certiorari. The petition shall specify the parties seeking review and shall designate the respondent(s) and the order or decision, or part thereof, to be reviewed. In each case, the agency shall be named respondent. The State of Utah shall be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) **Statutory and docketing fees.** At the time of filing any petition for review, the party obtaining the review shall pay to the clerk of the appellate court such filing fees as are established by law, and also the fee for docketing the appeal. The clerk shall not accept a petition for review unless the filing and docketing fees are paid.

(c) **Service of petition.** A copy of the petition for review shall be served by the petitioner on the named respondent(s), upon all other parties to the proceeding before the agency, and upon the Attorney General of Utah, if the state is a party, in the manner prescribed by Rule 3(e). The petitioner, at the time of filing the petition for review, shall also file with the clerk of the appellate court a certificate reflecting service upon all parties to the agency proceeding who have been served.

(d) **Intervention.** Any person who seeks to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and upon all parties who participated before the agency, and file with the clerk of the appellate court a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene shall be filed within 40 days of the date on which the petition for review is filed.

Rule 15. The record on review.

(a) **Composition of the record.** The order sought to be reviewed, the findings or report on which it is based, the pleadings, and evidence before the agency shall constitute the record on review in proceedings to review the order of an agency.

(b) **Omissions from or misstatements in the record.** If anything material to any party is omitted from the record or is misstated, the parties may at any time supply the omission or correct the misstatement by stipulation, or the appellate court, upon motion or on its own initiative, may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

Rule 16. Filing of the record.

(a) **Agency to file; time for filing; notice of filing.** The agency shall file the record with the clerk of the appellate court within 40 days after service upon it of the petition for review. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.

(b) **Filing; what constitutes.** The agency may file the entire record or such parts as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies may be filed. Instead of filing the record or designated parts, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts as the parties may designate. The filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record. Upon request of the court or the request of a party, the record shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.

Rule 17. Stay pending review.

Application for a stay of a decision or order of an agency pending direct review in the appellate court shall ordinarily be made in the first instance to the agency if the agency is authorized by law to grant a stay. If a motion for such relief is made to the appellate court, the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed those parts of the record relevant to the relief sought. Reasonable notice of the filing of the motion and any hearing shall be given to all parties to the proceeding in the appellate court. The appellate court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be considered by a single justice or judge of the court.

Rule 18. Applicability of other rules to review.

All provisions of these rules are applicable to review of decisions or orders of agencies, except that Rules 3 through 8 and 11 through 13 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner in proceedings to review agency orders.